STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff/Appellee

COA: 314315
LCT: 11-012794-01 FC

SCT:149917

v.

JOHN OLIVER WOOTEN,

Defendant/Appellant

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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF PURSUANT TO COURT ORDER

PROOF OF SERVICE

Order of the Court Below

Order of this Court dated June 3, 2015.

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CASE LAW

DEFENDANT'S STATEMENT OF QUESTIONS PRESENTED

I. Did the Trial Court err by not granting a mistrial with prejudice, in light of the prosecutor's actions during Defendant Wooten's first trial?

A. Is the prosecution prohibited, in its case in chief, from eliciting testimony from a police witness regarding the Defendant's pre-arrest silence and/or failure to come forward to explain a claim of self-defense?

B . Is Pre-arrest silence inadmissible as substantive evidence of guilt and should it be disallowed as evidence in the prosecution's proofs in mere anticipation of a self-defense claim ?

C. Where Judge Callahan correctly ordered a Mistrial after the prosecutor asked a key witness about the Defendant's silence did he err by not finding that the prosecutorial misconduct was intentional and that the Mistrial should have been granted With Prejudice, barring retrial as Defendant's retrial violated the bar against Double Jeopardy?

Defendant answers "YES" to all of the Questions posed above.

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant JOHN OLIVER WOOTEN was convicted of Second degree Murder [MCL 750.317] and Assault with intent to Murder [MCL 750.83] Felon in Possession [MCL 750.224] and Felony Firearm 2nd offense [MCL 750.227BB] after a jury trial held before the Honorable James Callahan in Wayne County Circuit Court on November 27 , 2012. Defendant Wooten was sentenced on December 13, 2012 to serve 30-50 years each on the Second Degree Murder and Assault with intent to Murder, plus 4 years for Felon in Possession and 5 years on Felony Firearm, 2nd offense. The Court below issued a Per Curiam unpublished opinion on June 26, 2014 and thus this case is timely filed with 56 days per MCR 7.302. This Court issued an order requesting that Defendant file a Supplemental Brief addressing the issues raised herein, (Order of this Court and the Court of Appeals attached)

STATEMENT OF FACTS

In December of 2011, Defendant John Wooten was criminally charged as a result of a shooting incident occurring at a topless bar and strip club "The Pretty Woman" in Detroit during the early morning hours of August 5, 2011. He was charged on four counts, including (1) the deliberate with intent and premeditation murder of Alfonso Thomas, (2) assault with intent to murder on Omar Madison, (3) felon in possession of a weapon, and (4) weapons felony possession. (JT Day 1 I at 18-19).

The Defendant, having pled not guilty, proceeded to his first trial on Wednesday, July 25, 2012 before Judge James A. Callahan. Antonio D. Tuddles proceeded on behalf of the Defendant, while Steven Kaplan was the Assistant Prosecuting Attorney for Wayne County. This trial ended in a mistrial without prejudice after an impermissible question regarding the defendant's pre-arrest silence. The second trial commenced on Monday, November 19, 2012, again before Judge Callahan. Mr. Tuddles remained defense counsel, while Mr. Kaplan was replaced by Michael Harrison. The second trial ended in a guilty verdict on all four counts, with the jury finding Wooten guilty of a charge less serious than premeditated murder on count one: second degree murder.

At the first trial, opening statements were made and the prosecution called their first witness, Janie Thomas, the mother of the victim, Alfonso Thomas. (JT I Day 1 at 102) The next witness from the prosecution was Officer Jeffrey Bare. (JT I at 113.) He was employed with the City of Detroit Police Department's Northeastern District on the night of the incident, and responded to the scene at approximately 2:00 a.m. on August 5. (JT I Day 1 at 114.) By the time he arrived, both the victim and the Defendant had gone from the scene, however, the injured Mr.

Madison was still lying inside the club on the ground. (JT I Day 1 at 115.) He approximates his time spent at the scene at approximately four hours. He stated he noticed "what might be blood" on the ground outside of the club's front door, and described it as fresh blood. (JT I Day 1 at 116-17.) He further testified that the pool of blood was five inches in circumference, and that he did not notice any shell casings on the ground. (JT I Day 1 at 117.) Officer Bare stated that he did not observe a holster at the scene, and further that he took information on a suspect and held the scene for homicide. (JT I Day 1 at 118-19.)

On cross-examination, Officer Bare stated that he had spoken only to Mr. Madison, and no others at the scene. (JT I Day 1 at 120.) In response to questions from the jury, he stated that the pool of blood he saw was approximately two to three feet from the door of the establishment. (JT I Day 1 at 122.) On re-direct from the prosecution, he stated he was not an evidence technician and that he was guessing about the measurements he had stated. (JT I Day 1 at 123.)

Next the prosecution called Officer Raymond Diaz, a Detroit Police Officer of over 11 years experience who processed the scene. (JT I Day 1 at 124-25.) He arrived at approximately 4:20 a.m. on August 5, and prepared an evidence technician's report measuring three pages in length, including a sketch of the scene. (JT I Day 1 at 125.) He stated he found bullets as well as an empty holster, which he believed housed a semi-automatic gun. (JT I Day 1 at 131.) He further stated that he could not tell if the three bullets he recovered were the same kind of bullets, or if they were all different kinds of bullets. Over the defense's objection, Officer Diaz guessed that a lack of shell casings in a situation similar to the one at hand would mean that no semi-automatic weapon had been fired. (JT I Day 1 at 135.) However, the court sustained an objection asking directly what a lack of shell casings meant at the actual scene of the incident, as Officer Diaz had arrived two hours after the shooting occurred. (JT I Day 1 at 133.)

On cross-examination Officer Diaz stated that there was no indication that a revolver had been kept in the empty holster, due to the indentations on the holster itself. (JT I Day 1 at 143.) Further, he agreed that he did not know whether another individual had picked up or moved a semi-automatic weapon on the scene before he had arrived. (JT I Day 1 at 148.) Furthermore, he stated that a security camera situated above the pool of blood was facing east, towards the very back of the parking lot on the property. (JT I Day 1 at 151.) On re-direct, he stated that he did not know whether the cameras were operational or real. (JT I Day 1 at 151.) In response to questions from the jury, he stated he could not give a precise caliber of the bullets involved, but that they were larger than a .22. further, he stated that he looked on south and west walls and on two vehicles, and found no further damage worth noting. (JT I Day 1 at 155.) On re-cross once again, he could not say there was blood on a bullet found on the sidewalk. (JT I at 159.)

Next, the prosecution called Omar Madison, the complaining witness in count (2) and manager of The Pretty Woman bar on the night of the incident. (JT I Day 1at 160.) He stated that the victim Mr. Thomas was working as a valet on August 5. Further, he said he heard the Defendant talking about shooting up the bar earlier that night. (JT I Day 1 at 164.) Later, Madison stated that when the defendant tried to get back into the bar later that night, the Defendant tried to avoid being searched for weapons, while Madison felt a gun in the Defendant's pants and proceeded to throw him out of the bar. (JT I Day 1at 166-67.) Meanwhile, the victim grabbed a gun off of another individual to cover Madison. (JT I Day 1 at 169.) After attempting to break the crowd up, they turned to go back into the bar, and that is when the shooting started. *Id.* Madison stated that when he turned to see who was shooting, he saw the defendant with the gun. (JT I Day 1 at 170.) When the prosecution asked whether anyone had threatened the defendant in any way, Madison replied that typically the Defendant was the one

who made threats, over the objection of the defense. The objection was sustained and the jury was instructed to disregard Madison's answer. (JT I Day 1 at 173.)

On cross-examination, defense attorney Tuddles began with impeachment of Madison with his preliminary exam testimony. Specifically, defense counsel pointed out that during the preliminary exam he asserted that he only felt the gun when he moved to throw the Defendant out, contrary to earlier testimony that he "knew" the Defendant was armed prior to throwing him out. (JT I Day 1 at 177-187.) Madison repeatedly gave non-responsive answers to questions, volunteered information when there was no question on the floor, and at times seemed confused and frustrated. After admitting he knew the victim Mr. Thomas typically carried a gun, Madison admitted that he made statements to the contrary during earlier testimony because he did not think it was important. (JT I Day 1 at 221.) He later admits that he left information out of his story, depending on whether or not he thought it was important, regardless of whether it was true. (JT I Day 1 at 224.)

The second day of the trial began with re-direct examination of Madison. The jury was sent out after the prosecuting attorney attempted to elicit testimony from Mr. Madison about prior bad acts by the Defendant. (JT I Day 2, 4-5.) The court ruled that as the prosecution had failed to present 404b notice to the defense, they could not go into events which happened prior to August 4th, which were mentioned the day before during Madison's original testimony and were part of the narrative of the events which occurred in the early morning of August 5. (JT I at Day 2, 5.) Questions from the jury included whether Madison had a learning disability, to which he replied he had a Bachelors Degree from Knoxville College in Knoxville, Tennessee. (JT I at Day 2, 12.) Further, he demonstrated that he saw the victim holding the gun downward at a forty-five degree angle. (JT I at Day 2, 17.) Again on re-cross examination, he stated that he said "Boo

[referring to the victim Thomas] get your gun," loud enough for the Defendant to hear. (JT I at Day 2, 29.)

The prosecution next called Anthony Gary, who worked as a party promoter every Thursday at The Pretty Woman Bar. (JT I at Day 2, 33.) He was present Thursday, August 4 2011 through the early morning hours of Friday, August 5. Gary stated that as the situation escalated, Mr. Thomas grabbed his gun off of him, and further, that the empty holster police found in the parking lot was his. (JT I at Day 2, 37-38.) When the shooting began, Gary testified that he heard three or four shots, and that his gun was not fired as he had checked it afterwards. (JT I at Day 2, 40, 42.)

On cross-examination, Gary admitted that he failed to tell investigators that Thomas had pulled his gun off of him. (JT I at Day 2, 43.) Gary stated that his gun had ended up on the ground near the valet area after the shooting. (JT I at Day 2, 47.) Gary agreed he didn't "think" to tell the police that the Thomas was holding Gary's gun when Thomas was shot, nor did Gary test his gun to see if it had been fired that day. (JT I at Day 2, 50-51.) Mr. Gary admitted that he removed his gun from the scene because he "didn't want it to be a part of the situation." (JT I at Day 2, 62.)

Next the prosecution called Officer Latonya Brooks, assigned to homicide. (JT I at Day 2, 71.) She told the jury that it took four months to find the Defendant, and that Defendant Wooten did not come into the police station to explain his claim of self-defense. (JT I at Day 2, 72, 76.) After a question regarding whether the Officer had information regarding the victim's reputation, a sidebar was convened and the jury was sent out. (JT I at Day 2, 77.) When the prosecuting attorney began to speak, the court interrupted him and stated that per a discovery order issued on January 6, 2012, information regarding any criminal record a party has in its

possession concerning any witnesses must have been turned over within two weeks of the order. (JT I at Day 2, 77.) When the prosecuting attorney stated that the victim could not testify and was therefore not a witness, the court replied that he is a witness as he is the complaining witness, and that fact was included in the charging information. (JT I at Day 2, 78.) A back-and-forth exchange occurred, in which the court expressed frustration with the prosecuting attorney. (JT I at Day 2, 79.) Defense counsel, Mr. Tuddles, stated that he had no documentation regarding the victim's criminal history even though he had requested that evidence from the prosecuting attorney. (JT I at Day 2, 80.)

With the jury still out of the courtroom, the judge allowed questioning of Officer Brooks in regard to whether she knew anything of the victim's criminal record. (JT I at Day 2, 81-82.) Officer Brooks stated she understood that victim Thomas had convictions including a CCW violation, possession of stolen property, and fleeing and eluding. (JT I at Day 2, 82.) The court sent staff to make copies of prosecution records for the defense counsel on the matter. The jury re-entered, and Officer Brooks testified that the victim had a reputation for non-violence. (JT I at Day 2, 83.)

On cross-examination, defense counsel asked if Officer Brooks still would consider the victim a peaceful person in light of his criminal convictions and his parole from the Michigan Department of Corrections, and she doggedly re-affirmed her answer. (JT I at Day 2, 86.) Defense counsel also discussed with Officer Brooks that there was no mention of Anthony Gary's gun in either Madison's or Gary's statements. (JT I at Day 2, 86-92.) Further, she admitted that she did not request that the victim's hands be tested for residue powder to determine if he had fired a gun that night, nor had she tested the gun to see if it had been fired, nor did she have progress notes delineating her progress in the case. (JT I at Day 2, 92-105.)

Later, she stated that had she known about the second gun she would have tried to follow up on that lead. (JT I at Day 2, 105.)

On redirect, after inquiring about evidence found at the scene, the prosecuting attorney asked Officer Brooks if "In this case, would you have enjoyed talking to the Defendant?" (JT I at Day 2, 106-108, 109 at lines 2-3.) She replied, "yes." Defense counsel immediately objected, the court sustained, and a sidebar ensued. Judge Callahan then directed his comments at the prosecuting attorney, stating he was disturbed that Mr. Kaplan would ask a question regarding statements "not being made" by the Defendant after he was specifically told to avoid the topic in an earlier conference. (JT I at Day 2, 109 at lines 11-21.) When asked to explain, Mr. Kaplan stated the question was asked in response to the claim that there was a second gun on cross examination, and the questions asked to Officer Brooks regarding whether she would have wanted to test that gun. (JT I at Day 2, 109 at lines 22-25.) He implied that the person with knowledge about the gun was the Defendant himself, and thus the question arose. (JT I at Day 2, 110 at lines 1-3.)

Judge Callahan noted the weak nature of this explanation, and replied that there was already evidence of a second gun present due to the introduction of the holster found at the scene, and witnesses who testified that the holster would not have held a revolver as used by Defendant Wooten , but would only house a semi-automatic. (JT I at Day 2, 110.) Mr. Kaplan stated that the defense had argued that the second gun had been fired, and thus the question was part of his proper response. The court corrected him., noting that the defense had asked questions regarding whether Officer Brooks would have wanted to test the gun to see "if" it had been fired. (JT I at Day 2, 111.) After lunch recess Defense counsel Tuddles addressed the court at length and requested a mistrial based on the prosecutor's query into whether or not testimony from

Defendant Wooten would have been helpful. (JT I at Day 2, 112-117.) Citing *Oregon v. Kennedy,* 456 U.S. 667 (1982), and *People v. Dawson*, 431 Mich. 234 (1988), defense counsel argued that the prosecutor believed his case to be a losing one and *purposefully* asked the question to allow for a new trial. (JT I at Day 2, 114.) He further argued that such action was prosecutorial misconduct, in light of Mr. Kaplan's "20 plus years" of experience, and jeopardy should attach. (JT I at Day 2, 114, 116-117.)

Mr. Kaplan briefly responded that Mr. Tuddles was "wrong about the law," and that *People v. Collier* and *Jenkins v. Anderson* both state that impeachment of a defendant's pre-arrest silence is constitutional and permissible when "it would have been natural for a defendant to come forward." (JT I at Day 2, 117-118.) He reiterated that the cross-examination of Officer Brooks as to a second gun triggered the legitimacy of such a question as he asked. (JT I at Day 2, 118.) He denied that the question was misconduct on his part. (JT I at Day 2, 118.)

Mr. Tuddles responded again at length, responding both to Mr. Kaplan's argument and personal comments Mr. Kaplan made to Mr. Tuddles about Kaplan's "winning" trial record. (JT I at Day 2, 118-120.) He reiterated witness testimony that evidenced a second gun was present, and argued that those witnesses do not have the same Fifth Amendment protections as the Defendant. (JT I at Day 2, 119.) Mr. Tuddles made it clear that the law protected a Defendant's silence but that other witnesses, who had also lied or not been forthcoming, were not protected. (JT I at Day 2, 120.)

The court then responded to the motion for a mistrial. In response to the prosecution's argument, the court considered *People v. Collier,* 426 Mich. 23 (1986) which cites *Commonwealth v. Nickerson*, 386 Mass. 54 (1982.) While the prosecution argued that impeachment with pre-arrest silence is valid per these precedents, the court stated that the

Defendant could not even be impeached as he had not decided whether to testify at that point in the trial. (JT I at Day 2, 121-22.) The court stated that to justify the question posed to Officer Brooks in order to substantiate the second gun "is ludicrous" because of the other evidence already presented. The court continued that both *Nickerson* and *Collier* suggest there must be some "natural" consequence or circumstance that would prompt the defendant to come forward for this line of reasoning to be valid. (JT I at Day 2, 122.) Since the charges brought against Defendant Wooten were "almost instantaneous," Judge Callahan did not believe it would be a "natural thing" for the defendant to come forward.

Judge Callahan then granted the motion for a mistrial without prejudice, insinuating that Mr. Kaplan had asked the question in "the heat of combat (which) overwhelms our rational decision making processes." (JT I at Day 2, 123.) Judge Callahan further commented *that he did not believe the jury would have found Mr. Wooten guilty, and would have given a directed verdict on count one* at the end of the prosecution's case. (JT I at Day 2, 126.) The judge commented on the prosecution's inability to bring forth three witnesses, his belief that the prosecution's case was "in the toilet," and the seeming lack of preparation in regards to witnesses Madison and Gary. (JT I at Day 2, 124, 126, 130.)[1] He further stated that he was granting the mistrial without prejudice to give the prosecution "the benefit of the doubt." (JT I at Day 2, 127.)[2] Defense counsel attempted to move for a directed verdict on count one, which the court denied as would only be proper after the prosecution rested its case, which it had not. (JT I at Day 2, 128.) A second trial was scheduled for November 2012. Defendant, convicted of second degree murder at the second trial, appealed and the court below affirmed. Defendant sought

[1] Judge Callahan commented, "I'd like to see you try a case in civil court with an experienced trial lawyer, Mr. Kaplan, you'd have your fanny handed to you in a basket." (JT I at Day 2, 132, at lines 15-18.)

[2] Judge Callahan further commented, "So, was it to the benefit of the prosecution to have had a mistrial granted without prejudice? You bet your sweet bippy." (JT I at Day 2, 126 at lines 23-25.)

leave to appeal in this Court, and this Court ordered that the Defendant file a supplemental pleading addressing the issues outlined herein. (See Order of June 3, 2015, attached)

ARGUMENTS

I. The Trial Court erred by not granting a mistrial with prejudice, in light of the prosecutor's actions during Defendant Wooten's first trial.

A. The prosecution is prohibited, in its case in chief, from eliciting testimony from a police witness regarding the Defendant's pre-arrest silence and/or failure to come forward to explain a claim of self-defense.

B . Pre-arrest silence is inadmissible as substantive evidence of guilt and should be disallowed as evidence in the prosecution's proofs in mere anticipation of a self-defense claim.

C. Judge Callahan correctly ordered a mistrial after the prosecutor asked a key witness about the Defendant's silence but erred by not finding that the prosecutorial misconduct was intentional and that the mistrial should have been granted with prejudice, barring retrial as Defendant's retrial violated the bar against Double Jeopardy.

Issue Preservation: Defendant John Wooten moved for mistrial and argued that the mistrial should be granted with prejudice for all the reasons argued herein. (JT I at Day 2, 123.)

Standard of Review: Double Jeopardy questions are to be reviewed *de novo* by this Court, *People v Smith* 478 Mich 298 (2007). However, this Court is asked to review the trial court's finding that there was not overtly intentional misconduct on the part of the prosecution. This is a mixed question of fact and law. This Court reviews factual findings under the clearly erroneous standard. MCR 2.613(C). This Court reviews questions of law *de novo*. *People v. Laws*, 218 Mich App. 447, 451 (1996). See also, *People v Tracey* 221 Mich App 321 (1997)

The Interjection of Error at the first trial: Defendant Wooten's first trial was not going well for the Wayne County Prosecutor. The prosecution had not prepared its witnesses and was not

familiar with the facts. The prosecutor was unaware that the victim, Alfonso Thomas, held a gun and pointed it at the Defendant *before* the Defendant drew his own gun. (JT I at Day 2, 37-38.) Witnesses were not properly interviewed by the police and thus the prosecutor was unprepared for testimony that the *victim* took another man's gun and pointed it at the Defendant. (JT I at Day 2, 43, 47, 50-51) Indeed, the gun that was pointed at the Defendant was quietly *removed* from the crime scene because the gun's owner "didn't want it to be a part of the situation." (JT I at Day 2, 62.)

Similarly, the prosecutor ran into trouble when he called Officer Latonya Brooks, assigned to homicide. (JT I at Day 2, 71.) She told the jury that it took four months to find the Defendant, and that *Defendant Wooten did not come into the police station to explain his claim of self-defense.* (JT I at Day 2, 72, 76.) After a question regarding whether the Officer had information regarding the victim's reputation, a sidebar was convened and the jury was sent out. (JT I at Day 2, 77.) [3]

Officer Brooks was allowed to testify that the victim, a valet and part time bouncer at a strip club, had a reputation for non-violence. (JT I at Day 2, 83.) On cross-examination, defense counsel asked if Officer Brooks still would consider the victim a peaceful person in light of his criminal convictions (CCW, receiving stolen property, fleeing and eluding) and his parole from the Michigan Department of Corrections, and she doggedly re-affirmed her answer. (JT I at Day

[3] When the prosecuting attorney began to speak, the court interrupted him and stated that per a discovery order issued on January 6, 2012, information regarding any criminal record a party has in its possession concerning any witnesses must have been turned over within two weeks of the order. (JT I at Day 2, 77.) When the prosecuting attorney stated that the victim could not testify and was therefore not a witness, the court replied that he was a witness as he was the complaining witness, and that fact was included in the charging information. (JT I at Day 2, 78.) A back-and-forth exchange occurred, in which the court expressed frustration with the prosecuting attorney. (JT I at Day 2, 79.) Defense counsel, Mr. Tuddles, stated that he had no documentation regarding the victim's criminal history even though he had requested that evidence from the prosecuting attorney. (JT I at Day 2, 80.)

2, 86.) Officer Brooks admitted that she did not request that the victim's hands be tested for residue powder to determine if he had fired a gun that night, nor had she tested the gun to see if it had been fired, nor did she have progress notes delineating her progress in the case. (JT I at Day 2, 92-105.) Later, she stated that had she known about the second gun she would have tried to follow up on that lead. (JT I at Day 2, 105.)

On redirect the prosecuting attorney, now painfully aware that his case against Defendant Wooten was beyond salvaging, asked Officer Brooks if "**In this case, would you have enjoyed talking to the Defendant?"** (JT I at Day 2, 106-108, 109 at lines 2-3.) She replied, "**yes."** Defense counsel immediately objected, the court sustained, and a sidebar ensued. Judge Callahan then directed his comments at the prosecuting attorney, stating he was disturbed that Mr. Kaplan would ask a question regarding statements "not being made" by the Defendant after he was specifically told to avoid the topic in an earlier conference. (JT I at Day 2, 109 at lines 11-21.) When asked to explain, Mr. Kaplan stated the question was asked in response to the claim that there was a second gun on cross-examination. (JT I at Day 2, 109 at lines 22-25.) He implied that the person with knowledge about the gun was the Defendant himself, and thus door was opened by the Defense. (JT I at Day 2, 110 at lines 1-3.)

Judge Callahan noted the weak nature of this explanation, and replied that there was already evidence of a second gun present due to the introduction of the holster found at the scene, and witnesses who testified that the holster would not have held a revolver as used by Defendant Wooten, but would only house a semi-automatic. (JT I at Day 2, 110.) Mr. Kaplan stated that the defense had argued that the second gun had been fired, and thus the question was part of his proper response. The court corrected him, noting that the defense had asked questions regarding whether Officer Brooks would have wanted to test the gun to see "if" it had been fired.

(JT I at Day 2, 111.) After lunch recess counsel Tuddles addressed the court at length and moved for a mistrial based on the prosecutor's query into whether or not testimony from Defendant Wooten would have been helpful. (JT I at Day 2, 112-117.) Citing *Oregon v. Kennedy,* 456 U.S. 667 (1982), and *People v. Dawson*, 431 Mich. 234 (1988), defense counsel argued that the prosecutor believed his case to be a losing one and *purposefully* asked the question to allow for a new trial. (JT I at Day 2, 114.) He further argued that such action was prosecutorial misconduct, in light of Mr. Kaplan's "20 plus years" of experience, and jeopardy had attached. (JT I at Day 2, 114, 116-117.)

A. The prosecution is prohibited, in its case in chief, from eliciting testimony from a police witness regarding the Defendant's pre-arrest silence and/or failure to come forward to explain a claim of self-defense.

At trial, the prosecutor argued that pursuant to *Jenkins v. Anderson* 447 US 231, 240 (1980) the use of pre-arrest silence for impeachment was constitutional and permissible when "it would have been natural for a defendant to come forward." (JT I at Day 2, 117-118.) He reiterated that the cross-examination of Officer Brooks as to a second gun triggered the legitimacy of such a question as he asked. (JT I at Day 2, 118.) He denied that the question was misconduct on his part. (JT I at Day 2, 118.) Defense counsel argued that the law protected a Defendant's silence. (JT I at Day 2, 120.)

There is no United States Supreme Court ruling allowing a prosecutor, in its case-in-chief, to use pre-arrest silence as substantive evidence of guilt. Some federal circuits [4] allow such use. Importantly, the Sixth Circuit has specifically held, in *Combs v Coyle* 205 F 3d. 269, 285 (6th Cir 2000) that use of *pre-arrest* silence may only be used for *impeachment* purposes once the defendant has chosen to testify in his or her own case and has thus waived their Fifth Amendment privilege against self-incrimination.[5] The rationale in *Combs* stems from the Unites States Supreme Court's rationale in *Griffin v California* 380 US 609, 614 (1965) "[C]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice' which the Fifth Amendment outlaws" .

[4] See, for example *US v Thompson*, 82 F 3d 849 (9th Cir. 1996) where the Court held that the prosecutor's closing argument, which mentioned the silence of the defendant and his request to speak with an attorney when the police arrived at his home, where he had shot and killed a man during a drug deal as not "plain error" requiring reversal.

[5] Other Federal Circuits have held similarly: *US v Burson* (953 F 2d 1196, 1200-02 (10th Cir 1991) *Coppola v Powell* 878 F2d 1562, 1567-68 (1st Cir 1989)

The heart of the prohibition against use of a defendant's silence in many (but not all) circumstances comes from the Fifth Amendment prohibition against *compelled* self-incrimination. "No person . . . shall be compelled in any criminal case to be a witness against himself. " The Fifth Amendment's right to silence applies to a defendant in a state court proceeding under the Fourteenth Amendment. *Griffin v. California*, *supra*. In general, a defendant's decision to remain silent cannot be used as substantive evidence of guilt. *Id.* This rule clearly applies to a defendant's silence after the defendant actually invokes the right to remain silent. *See id.; Doyle v. Ohio*, 426 US 610, 612 (1976) (precluding the use for impeachment purposes of a defendant's post- *Miranda* silence). However, "the constitutionality of using a defendant's pre- *Miranda* silence as substantive evidence of guilt [has] not been addressed by the Supreme Court." *Jones v. Trombley*, 307 Fed.Appx. 931, 933 (6th Cir. 2009) (unpublished). The circuit courts have split on this issue. However, this Court should follow the 6th Circuit, *Combs v. Coyle*, *supra.*

Apart from substantive evidence, a defendant's pre- *Miranda* silence can be used to **impeach** his credibility as a witness. *Portuondo v Agard*, 529 US 61, 69 (2000) When a defendant chooses to testify at trial, he has opened his credibility to attack like any other witness. As the Supreme Court explained in *Raffel v United States*, "We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial, or to any tribunal, *other than that* in which the defendant preserves it by refusing to testify." 271 US 494, 499 (1926). Moreover, a prosecutor can refer to a defendant's silence if doing so would be a fair reply to a defense theory or argument, for example, when defense counsel asserts that the government did not give his client an opportunity to tell his side of the story. *United States v. Robinson*, 485 US 25 (1988) (holding that the prosecutor can refer to the defendant's silence at

trial when defense counsel argued that his client was precluded from telling his side of the story); *Lockett v. Ohio*, 438 US 536 (1978) (rejecting the Fifth Amendment claim of the defendant because her "own counsel had clearly focused the jury's attention on her silence, first, by outlining her contemplated defense in his opening statement and, second, by stating to the court and jury near the close of the case, that Lockett would be the `next witness'"). "When the prosecutor goes no further than to take defense counsel up on an invitation, that conduct will not be regarded as impermissibly calculated to incite the passions of the jury." 2 *Crim. Prac. Manual* § 57:18 (2009) (citation omitted). This "invited reply" rule is limited, though, to the scope of the invitation.

In short, the Fifth-Amendment right bred the *Miranda* warnings given at the time of arrest *"you have the right to remain silent"*. Once a defendant waives that right to remain silent and begins to testify, his previous silence may be used against him. *Raffel, supra*. Furthermore, a defendant may *invite* commentary by the prosecutor about his silence *if* he argues that he was overwhelmed by the legal proceedings and claims he did not have a chance to respond to the prosecutor's charges. (for example, see *Hall v Vasbinder* 563 F 3d 222 (6th Circuit 2009)

Summary: Neither the *Raffel* or *Vasbinder* scenarios are present here. Indeed the factual situation presented in Defendant Wooten's case is somewhat unique in that he *did not* have police contact immediately after the shooting and was not arrested for four months. Almost all of the cases and law review articles which examine the use of a defendant's silence when *confronted* by the police. In this case, Mr. Wooten avoided police contact out of fear and the silence which the prosecutor commented on was not *affirmative* silence, but an absence of contact, which by definition, meant the defendant was "silent". Here, the prosecutor is *really* arguing that the defendant had some kind of duty or moral obligation to come forward with

evidence. Defendant acknowledges that evidence of flight is admissible to show guilt, but contends here *that he has no obligation to come forward as a state's witness*, or to be a witness against himself (since he is the one charged with homicide). Compelling a person *to be a witness against oneself is prohibited by the Constitution*. As such, the prosecutor's comments, which imply that Defendant *did* have such a duty, are clearly error.

B . Pre-arrest silence is inadmissible as substantive evidence of guilt and should be disallowed as evidence in the prosecution's proofs in mere anticipation of a self-defense claim.

Defendant Wooten's counsel gave an opening statement which hinted that the Defendant could not have premeditated the homicide he was charged with, given the facts of the case. Counsel did not specifically argue that the Defendant was acting in self-defense, and he did not explain the legal requirements of such a defense to the jury at all. He merely hinted that there was more to the story than the prosecutor would have them believe. (JT I Day 1, p. 99) As such, for the reasons and all of the case law argued in (A) *supra*, evidence of the defendant's pre-arrest, pre-*Miranda*, pre-trial silence is inadmissible. Furthermore, the prosecution did not just present evidence of Defendant's pre-arrest silence, he asked a witness to **comment** on that silence. On redirect the prosecuting attorney, now painfully aware that his case against Defendant Wooten was beyond salvaging, asked Officer Brooks if "**In this case, would you have enjoyed talking to the Defendant?"** (JT I at Day 2, 106-108, 109 at lines 2-3.) She replied, "**yes."** When the Judge expressed his concern that Mr. Kaplan has crossed the 5th-amendment line, Mr. Kaplan stated the question was asked in response to the claim that there was a second gun on cross-examination. (JT I at Day 2, 109 at lines 22-25.) He implied that the person with knowledge about the gun was the Defendant himself, and thus door was opened by the Defense. (JT I at Day 2, 110 at lines 1-3.) Judge Callahan noted the weak nature of this explanation, and replied that there was *already* evidence of a second gun present due to the introduction of the holster found at the scene, and witnesses who testified that the holster would not have held a revolver as used by Defendant Wooten, but would only house a semi-automatic. (JT I at Day 2, 110.)

Introduction of the Defendant's silence or refusal to come forward and be a witness against himself and for the prosecution in any way was error. Defendant had not yet taken the stand. Her hinted that he did not premeditate the crime, but could have chosen, at the conclusion of the prosecution's proofs, to rest and not testify at all. Of course, the case never reached that status since Judge Callahan, who was best suited to evaluate the proceedings, granted a mistrial. Judge Callahan's error came not in his factual determination that a mistrial was warranted and necessary, but that the error was not intentional by the prosecutor and thus did not require mistrial with prejudice.

C. Judge Callahan correctly ordered a mistrial after the prosecutor asked a key witness about the Defendant's silence but erred by not finding that the prosecutorial misconduct was intentional and that the mistrial should have been granted with prejudice, barring retrial as Defendant's retrial violated the bar against Double Jeopardy.

The trial court, when considering the motion for mistrial, looked to *People v. Collier,* 426 Mich. 23 (1986) which cites *Commonwealth v. Nickerson*, 386 Mass. 54 (1982.) While the prosecution argued that impeachment with pre-arrest silence is valid per these precedents, Judge Callahan noted that the Defendant could not be i*mpeached* as he had not decided whether to testify at that point in the trial. (JT I at Day 2, 121-22.) The court stated that to justify the question posed to Officer Brooks in order to substantiate the second gun was " ludicrous" because of the other evidence already presented. The court continued that both *Nickerson* and *Collier* suggest there must be some "natural" consequence or circumstance that would prompt the defendant to come forward for this line of reasoning to be valid. (JT I at Day 2, 122.) Since the charges brought against Defendant Wooten were "almost instantaneous," Judge Callahan did not believe it would be a "natural thing" for the Defendant to come forward.

Judge Callahan then granted the motion for a mistrial *without* prejudice, insinuating that Mr. Kaplan had asked the question in "the heat of combat (which) overwhelms our rational decision making processes." (JT I at Day 2, 123.) Judge Callahan further commented *that he did not believe the jury would have found Mr. Wooten guilty, and would have given a directed verdict on count one* at the end of the prosecution's case. (JT I at Day 2, 126.) The judge commented on the prosecution's inability to bring forth three witnesses, his belief that the

prosecution's case was "in the toilet," and the seeming lack of preparation in regards to witnesses Madison and Gary. (JT I at Day 2, 124, 126, 130.) He further stated that he was granting the mistrial without prejudice to give the prosecution "the benefit of the doubt." (JT I at Day 2, 127.)

Argument:

Judge Callahan may have chosen to give the prosecutor the benefit of the doubt, but there is simply no way to argue that the prosecutor was not *intentionally* trying to taint Defendant Wooten's trial. Even Judge Callahan thought so- he told the prosecutor that he acted rashly and stated the prosecutor was in "the heat of combat [which] overwhelms our rational decision making processes" In short the facts reveal that prosecutor Kaplan knew better, but in a *panic*, allowed his conduct to cross the line. The prosecutor asked a question he *knew* was constitutionally off limits; he had been *warned* about asking such impermissible questions earlier in the trial. He was a very experienced prosecutor. If a prosecutor intentionally causes a mistrial, re-trial is barred.

The case law is very straightforward on this legal issue. The Fifth Amendment of the United States Constitution protects a criminal defendant from being "twice put in jeopardy of life or limb . . . ." US Const, Am V; *People v Szalma* 487 Mich 708, 715-716(2010). The Michigan Constitution contains a parallel provision that this Court construes consistently with the Fifth Amendment.Const 1963, art 1, § 15; *Szalma* 487 Mich at 716. This provision protects a criminal defendant against multiple prosecutions for the same offense. *People v Lett* 466 Mich 206, 213-214, 215 (2002).

The trial court implicates this right when it declares a mistrial after the jury is empanelled and sworn. However, the Double Jeopardy Clause does not automatically bar a second trial when the trial court declares a mistrial. It is well settled, for instance, that where a defendant requests

or consents to a mistrial, retrial is not barred unless the prosecution provoked the defendant to request a mistrial. *Oregon v Kennedy* 456 US 667, 672 (1982)

If defense counsel argues that a mistrial is warranted but refuses to expressly consent to a mistrial the defendant has "consented to discontinuance of the trial by expressly objecting to its continuance." By moving the trial court for a mistrial, the defendant waives his or her double jeopardy claim ***unless prosecutorial misconduct provoked or "goaded the defense into making the motion***. *Oregon v Kennedy*, *supra*; *People v Dawson* 431 Mich 234, 253 (1988); *People v Gaval* 202 Mich App 51, 53 (1993). The *Dawson* ruling has not been overturned, but continues in force.[6] Indeed, a close reading of *Dawson* presents a situation eerily similar to the situation present by the current Wooten case. The *Dawson* court stated " Where the motion for mistrial was made by defense counsel, or with his consent, and the mistrial was caused by innocent conduct of the prosecutor or judge, or by factors beyond their control, or by defense counsel himself, retrial is also generally allowed, on the premise that by making or consenting to the motion the defendant waives a double jeopardy claim. Where a defendant's motion for mistrial is prompted by intentional prosecutorial conduct, however, the defendant may not, by moving for a mistrial, have waived double jeopardy protection. The United States Supreme Court has held that the Double Jeopardy Clause bars retrial where prosecutorial conduct was intended to provoke the defendant into moving for a mistrial. *Oregon v Kennedy,* 456 US 667 (1982).* * * Retrials are an exception to the general double jeopardy bar. Where a mistrial results from apparently innocent or even negligent prosecutorial error, or from factors beyond his control, the public interest in allowing a retrial outweighs the double jeopardy bar. *The balance tilts, however,* where the judge

[6] . See the recent *People v Aaron Smith* COA#307755 (11/15/2012) (*unpublished, per curiam*)

finds, on the basis of the "objective facts and circumstances of the particular case," that the prosecutor intended to goad the defendant into moving for a mistrial"

The *Dawson* court continued, in support of their finding that retrial was barred, to note that the prosecution knew its case was doomed and proceeded accordingly:

"The prosecutor's case was going badly. The police had not recovered any evidence from the scene of the crime. The only evidence implicating Dawson was the testimony of Nelson, the complaining witness, who had contradicted himself on at least one crucial matter …. Nelson's testimony was also confused concerning the times and events leading up to the alleged assault. One of the state's corroborating witnesses then testified that Nelson had provided him with a completely different account"

It is unlikely a court will have sufficient objective evidence to show the government **goaded** a defendant into seeking a mistrial just to better prepare its case. Simply appraising the **strength** of the government's case in the first proceeding is not enough to satisfy *Oregon v Kennedy'*s strict requirement that the defendant show by objective evidence the prosecutor's intent to provoke a mistrial. But, some scholars argue that an evaluation of the likelihood that a prosecutor would have obtained a conviction in the trial where he or she injects error requiring a mistrial might be a valid test.[7] If that were the test here for Defendant Wooten, given that the Judge noted that the prosecution's case was "in the toilet:, retrial should be barred. That test appears to be the test applied by this Court, albeit almost 30 years ago, in *Dawson, supra*.

The Double Jeopardy Clause does not bar all retrials. The Supreme Court of the United States has held that the charged offense may be retried where the mistrial was declared because of a hung jury. The Court has fashioned a balancing test focusing on the cause prompting the

[7] Henning, Peter J *Prosecutor Misconduct and Constitutional Remedies* Washington University Law Journal (1999) p. 808 fn 371

mistrial. The thrust of the Court's decisions is that the Double Jeopardy Clause does not bar retrial where the prosecutor or judge made *an innocent error* or where the cause prompting the mistrial was *outside their control*. Where the motion for mistrial is made by the prosecutor, or by the judge *sua sponte*, retrial will be allowed if declaration of the mistrial was "manifest[ly] necess[ary] What the prosecutor did here , after being warned, cannot be deemed an innocent error, nor was it outside their control.

> If a motion for mistrial is made by defense counsel, or with his consent, and the mistrial was caused by innocent conduct of the prosecutor or judge, or by factors beyond their control, or by defense counsel himself, retrial is also generally allowed, on the premise that by making or consenting to the motion the defendant waives a double jeopardy claim. Defendant Wooten notes and agrees where a mistrial results from apparently innocent or even negligent prosecutorial error, or from factors beyond his control, the public interest in allowing a retrial outweighs the double jeopardy bar. The balance tilts, however, where the judge finds, on the basis of the "objective facts and circumstances of the particular case," that the prosecutor intended to goad the defendant into moving for a mistrial. Thus, when a mistrial is declared, retrial is permissible under double jeopardy principles in two circumstances: (1) where there was "manifest necessity" to declare the mistrial or (2) where the defendant consented to the mistrial and was **not goaded** into consenting by **intentional** prosecutorial misconduct. See also *People v. Hicks*, 447 Mich. 819, 827-828, (1994)

Defendant Wooten asks this Court to consider that Judge Callahan, a very experienced trial Judge, was certainly under the impression that the prosecutor was in deep trouble. Judge Callahan then granted the motion for a mistrial without prejudice, insinuating that Mr. Kaplan had asked the question in "the heat of combat (which) overwhelms our rational decision making

processes." (JT I at Day 2, 123.) Judge Callahan further commented *that he did not believe the jury would have found Mr. Wooten guilty, and would have given a directed verdict on count one* at the end of the prosecution's case. (JT I at Day 2, 126.) The judge commented on the prosecution's inability to bring forth three witnesses, his belief that the prosecution's case was "in the toilet," and the seeming lack of preparation in regards to witnesses Madison and Gary. (JT I at Day 2, 124, 126, 130.)[8] He further stated that he was granting the mistrial without prejudice to give the prosecution "the benefit of the doubt." (JT I at Day 2, 127.) Judge Callahan further commented, "So, was it to the benefit of the prosecution to have had a mistrial granted without prejudice? You bet your sweet bippy." (JT I at Day 2, 126 at lines 23-25.)

A trial court must not give the Prosecution the "benefit of the doubt" here. If trial had continued, Judge Callahan stated he would have *granted* a directed verdict motion. The Defendant should have retracted his motion for a mistrial upon hearing that, but in good faith did not. The prosecutor did **not** make an honest mistake. In fact, he argued that he **meant** to ask the offending question in violation of *Collier*. The Prosecution intentionally asked a prohibited question and knew Mr. Tuddles would move for a mistrial because the prosecutor wanted another bite at the apple.

The Wayne County Prosecutor's office even replaced Mr. Kaplan with a different trial prosecutor for the second trial. The prosecution, woefully unprepared and faced with a case that seemed to show the Defendant was acting in self defense, was given the gift of a free do-over. At the second trial the Prosecutor's office was much much better prepared and had properly requested and provided evidence. Certainly, Defendant Wooten understands that this Court, and Judge Callahan, is loath to grant and uphold a mistrial with prejudice when a homicide charge

[8] Judge Callahan commented, "I'd like to see you try a case in civil court with an experienced trial lawyer, Mr. Kaplan, you'd have your fanny handed to you in a basket." (JT I at Day 2, 132, at lines 15-18.)

hangs in the balance. But what else will deter the prosecutors in Michigan from intentionally causing a mistrial unless they are held to the true intent of the double jeopardy clause? Defendants do not get another chance when a trial goes bad for them, and in our adversarial system, which we embrace, neither should the government. Defendant is entitled to Dismissal of his charges.

RELIEF /ORAL ARGUMENT REQUESTED

WHEREFORE, Defendant **John Oliver Wooten** respectfully requests that this Court set a date for abbreviated oral arguments on this issue of whether or not to grant his Application for Leave on these grounds, or alternatively, issue an Order reversing the Court of Appeals on this issue and Ordering that the trial court's Order of Mistrial be reinstated *With Prejudice*, thus barring retrial and dismissing the charges. Defendant Wooten is aware that this is an rare remedy, but argues its necessity given the principles espoused by the double jeopardy bar in the United States and Michigan Constitutions. The Prosecutor must not be allowed to purposefully create serious constitutional error and then benefit from that error.

Respectfully submitted,

Kristina L. Dunne -s-

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Date: July 7, 2015

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN **COA: 314315**

LCT: 11-012794-01 FC

Plaintiff/Appellee

v.

John Oliver Wooten
Defendant/Appellant
.

_____/

Kristina Larson Dunne P 45490
P. O. Box 97 Northville MI 48167
Attorney for the Defendant
248 895 5709

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF OAKLAND)

I, KRISTINA L. DUNNE hereby affirm that on 7/7/15 I served a copy of the Defendant's Application for Leave to Appeal, as well as this Proof of Service upon:

Prosecuting Attorney Wayne County
1441 St. Antoine
Detroit MI 48226

via first electronic service

_____Kristina L. Dunne –s-_____
Dated: 7/7/15

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN OLIVER WOOTEN,

Defendant-Appellant.

UNPUBLISHED
June 26, 2014

No. 314315
Wayne Circuit Court
LC No. 11-012794-FC

Before: MARKEY, P.J., and SAWYER and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, assault with intent to murder, MCL 750.83, felon in possession of a firearm ("felon-in-possession"), MCL 750.224f, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. He was sentenced, as a second habitual offender, MCL 769.11, to 30 to 50 years' imprisonment for the second-degree murder conviction, 30 to 50 years' imprisonment for the assault with intent to murder conviction, four to seven years' imprisonment for the felon-in-possession conviction, and five years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that, when the trial court granted his motion for a mistrial, it erred when it did not do so with prejudice, which would have barred retrial on double-jeopardy grounds. We disagree.

To preserve appellate review of a double-jeopardy violation, a defendant must object at the trial court level. See *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). Because defendant did not object to the trial court's decision to grant the motion for a mistrial without prejudice, this issue is not preserved. However, double-jeopardy issues "present[] a significant constitutional question that will be considered on appeal regardless of whether the defendant raised it before the trial court." *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). This Court reviews "an unpreserved claim that a defendant's double jeopardy rights have been violated for plain error that affected the defendant's substantial rights, that is, the error affected the outcome of the lower court proceedings. Reversal is appropriate only if the plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *McGee*, 280 Mich App at 682. The trial court's factual findings regarding whether the prosecutor "intended to goad the defendant

into moving for a mistrial" are reviewed for clear error. *People v Dawson*, 431 Mich 234, 258; 427 NW2d 886 (1988). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008).

"No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." US Const, Am V. "No person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, § 15. The Michigan Constitution's protection against double jeopardy is set forth in the same test used by federal courts, as stated in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932): "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *People v Smith*, 478 Mich 292, 311; 733 NW2d 351 (2007).

"When a mistrial is declared, retrial is permissible under double jeopardy principles where manifest necessity required the mistrial or the defendant consented to the mistrial and the mistrial was caused by innocent conduct on the part of the prosecutor or judge, or by factors beyond their control." *People v Echavarria*, 233 Mich App 356, 363; 592 NW2d 737 (1999). "Retrials are an exception to the general double jeopardy bar. Where a mistrial results from apparently innocent or even negligent prosecutorial error, or from factors beyond his control, the public interest in allowing a retrial outweighs the double jeopardy bar." *People v Tracey*, 221 Mich App 321, 326; 561 NW2d 133 (1997) (quoting *Dawson*, 431 Mich at 257). "The balance tilts, however, where the judge finds, on the basis of the 'objective facts and circumstances of the particular case,' that the prosecutor intended to goad the defendant into moving for a mistrial." *Id*. (quoting *Dawson*, 431 Mich at 257). "Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on [the] defendant's motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Oregon v Kennedy*, 456 US 667, 675-676; 102 S Ct 2083; 72 L Ed 2d 416 (1982).

At the first trial, the officer-in-charge, LaTonya Brooks, testified during cross-examination that she was not aware before trial that a second gun had been "present and had been pulled" by Alfonso Thomas, the deceased victim. During redirect examination, the prosecutor attempted to rehabilitate Brooks by asking questions prompting answers to the effect that there was no evidence of a second gun at the scene of the shooting that would have directed the investigation toward Anthony Gary's pistol. The prosecutor then asked, "In this case, would you have enjoyed talking to the [d]efendant?"

Defendant immediately objected, and an on-the-record sidebar conference was held at which the prosecutor explained that he was attempting to rebut defendant's theory that Thomas fired Gary's semiautomatic pistol, which had not been tested by or turned into police, toward defendant, causing defendant to fire back in self-defense. Defendant moved for a mistrial, arguing that the question violated his Fifth Amendment right against compelled self-incrimination, and that the prosecution deliberately asked the improper question so that defendant's forthcoming motion would be granted and the prosecution "would have a second strike" at the case. The prosecution responded that impeaching a defendant with evidence of his prearrest silence was permissible where "it would have been natural for a defendant to come

forward." Because defendant implied, in the course of cross-examining Brooks, that she failed to obtain relevant facts about Gary's gun from Gary and Omar Madison, defendant opened the door to the suggestion that defendant was equally capable of providing Brooks with that information, the prosecution argued.

The trial court found that the facts did not create a situation in which it would have been natural for defendant to come forward because the "charges brought against the defendant were probably almost instantaneous, and then he was not . . . found until December 3, 2011, which was almost . . . four months later." The judge granted defendant's motion for a mistrial without prejudice, explaining:

> Sometimes when we wind up getting involved in the give and take of a trial, the heat of combat overwhelms our rational decision making processes, and . . . that may very well have been the situation today. I don't believe that the last question that was posed to [Brooks] was directly intended to impeach the credibility of the defendant. As I said, even though [defendant] had not even testified as yet, or even made an election in that regard, or was consciously thought of by the prosecution as calling into question the defendant's right to remain silent guaranteed to him under the Fifth Amendment to the Constitution. So, I'm not going to dismiss this case with prejudice.

The trial court did not clearly err when it found that the prosecutor did not intend to create the conditions sufficient to justify declaration of a mistrial. Defendant's argument to the contrary is premised on the theory that the "first trial was not going well" for the prosecution because it "had no idea what its own witnesses were going to say" and the police "had not . . . investigated the evidence found at the scene, including an empty gun holster." In an effort to buy more time, defendant argues, the prosecutor deliberately asked Brooks a question, concerning defendant's failure to come forward during the investigation, that violated defendant's constitutional right against compelled self-incrimination.

On appeal, the prosecution argues that the question was not designed to draw a motion for a mistrial, and further that the question did not violate defendant's constitutional rights because it concerned his prearrest silence. "No person . . . shall be compelled in any criminal case to be a witness against himself." US Const, Am V; Const 1963, art 1, § 17. This privilege is violated when the prosecution comments on a defendant's postarrest, post-*Miranda*[1] silence. *Doyle v Ohio*, 426 US 610, 611; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Borgne*, 483 Mich 178, 186-187; 768 NW2d 290 (2009). However, a defendant's prearrest silence, as well as his silence after arrest but before he receives *Miranda* warnings, may be used against him because the "use of a defendant's silence only deprives a defendant of due process when the government has given the defendant a reason to believe both that he has a right to remain silent and that his invocation of that right will not be used against him." *Fletcher v Weir*, 455 US 603, 606-607; 102 S Ct 1309; 71 L Ed 2d 490 (1982); *Jenkins v Anderson*, 447 US 231, 240; 100 S Ct

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

2124; 65 L Ed 2d 86 (1980) ("[N]o governmental action induced [the defendant] to remain silent before arrest."); *Borgne*, 483 Mich at 187-188.

"Neither the Fifth Amendment nor the Michigan Constitution preclude[s] the use of prearrest silence for impeachment purposes." *People v Clary*, 494 Mich 260, 266; 833 NW2d 308 (2013) (internal punctuation omitted). "[W]here a defendant has received no *Miranda* warnings, no constitutional difficulties arise from using the defendant's silence before or after his arrest as substantive evidence unless there is reason to conclude that his silence was attributable to the invocation of the defendant's Fifth Amendment privilege." *People v Solmonson*, 261 Mich App 657, 665; 683 NW2d 761 (2004).

Defendant appears to take for granted the fact that the prosecutor violated his right against compelled self-incrimination, citing case law holding that a retrial is barred if a defendant's motion for a mistrial is prompted by prosecutorial misconduct, but offering no authority to support his position that the prosecutor's question to Brooks—"In this case, would you have enjoyed talking to the [d]efendant?"—actually constituted misconduct or was contrary to case law interpreting the Fifth Amendment and its counterpart in the Michigan Constitution. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009).

Because the prosecutor's question referred to defendant's failure to present investigators with an explanation that he acted in self-defense, that is, before he was arrested or received *Miranda* warnings, and because there was no indication that he was invoking his Fifth Amendment right to silence, evidence of defendant's prearrest silence was admissible as substantive evidence of his guilt, subject to the Michigan Rules of Evidence. *People v Hackett*, 460 Mich 202, 214; 596 NW2d 107 (1999) ("The issue of prearrest silence is one of relevance."); *Solmonson*, 261 Mich App at 665. Defendant's failure to come forward was especially relevant following defendant's cross-examination of Brooks wherein the implication of his line of questions was that defendant was falsely accused as the result of an inept police investigation that failed to uncover the gun that was fired toward defendant. Because the prosecutor's question was proper, the question was not misconduct, and, therefore, there was no basis upon which to grant defendant's motion for a mistrial with prejudice.

Defendant next argues that there was insufficient evidence to sustain his convictions of second-degree murder and assault with intent to murder. We disagree.

Due process requires that the evidence must have shown the defendant's guilt beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). This Court examines the lower court record de novo, in the light most favorable to the prosecution, to determine whether a rational trier of fact could have found that the evidence proved each element of the crime beyond a reasonable doubt. *Id.*

"In order to convict a defendant of second-degree murder, the prosecution must prove: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009) (internal quotations

omitted). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful [sic] disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id*. "Malice may be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *Id*. (internal quotations omitted). Malice may likewise be "inferred from the use of a deadly weapon." *People v McMullan*, 284 Mich App 149, 153; 771 NW2d 810 (2009), aff'd 488 Mich 922 (2010). "The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences." *Roper*, 286 Mich App at 84.

"The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (internal quotations and footnote omitted). The malice element of second-degree murder is necessary, but not sufficient, to satisfy the intent element of assault with intent to murder. *Brown*, 267 Mich App at 148-149.

Defendant's only argument against the sufficiency of the evidence is that the prosecution's witnesses "were hiding or trying to hide the fact that they were carrying or using firearms" on the night of the shooting, and that their testimony was "often incomplete and inconsistent."[2] However, the weight of the evidence, the credibility of witnesses, and what inferences can be fairly drawn from the evidence are questions that are resolved by the jury. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012); *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011).

There was sufficient evidence for a rational trier of fact to have found each element of second-degree murder and assault with intent to murder proved beyond a reasonable doubt. Four witnesses saw defendant shoot Thomas. Madison said that defendant and Thomas were approximately four feet apart. The witnesses agreed that defendant fired at least three and as many as five shots. Defendant threatened Madison with a gun after a confrontation approximately two weeks before the shooting involving defendant's having thrown a drink at Madison, and, on the night of the shooting, was overheard making threatening comments relating to robbing the club and repeatedly refused to be searched for weapons. Regarding the intent element of assault with intent to murder, *Brown*, 267 Mich App at 147, the jury could rationally have concluded that defendant bore a grudge against Madison—for the drink-throwing incident two weeks before the shooting, for refusing to allow defendant to enter the club with his revolver, and for physically removing him from the club upon his refusal to be searched—and therefore had the requisite intent to kill Madison.

Notwithstanding the prosecution's "burden of disproving the common law defense of self-defense beyond a reasonable doubt," *People v Dupree*, 486 Mich 693, 710; 788 NW2d 399

[2] Defendant does not cite to the lower court record in this issue. "Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court." MCR 7.212(C)(7); *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008).

(2010), defendant's theory of self-defense was implausible. It began with his admission that he refused to be searched for no apparent reason, continued with his statement that Madison then grabbed him for no apparent reason, and concluded with his failure, for approximately four months, to inform police that he acted in self-defense and that Gary held the gun that defendant maintained was used to fire at him. Reviewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the elements of second-degree murder and assault with intent to murder were proved beyond a reasonable doubt.

Defendant next argues that the prosecutor committed misconduct during closing argument by twice referring to defendant's prearrest silence. We disagree.

"In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). This issue is not preserved because defendant did not object during closing argument. "Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). A plain error affects a defendant's substantial rights if the error affected the outcome of the proceedings. *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Reversal is not required "where a curative instruction could have alleviated any prejudicial effect. Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *Id*.

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Defendant claims that a "prosecutor has a duty to not ask the jury to consider" a defendant's silence, citing no law in support of that statement.[3] Although that is the general rule, *Borgne*, 483 Mich at 186-187, the prosecution is entitled to use a defendant's prearrest silence, both for impeachment purposes and as substantive evidence of guilt, without offending the Fifth Amendment or the Michigan Constitution. *Clary*, 494 Mich at 266; *Solmonson*, 261 Mich App at 665. The first excerpt of closing argument to which defendant refers—"And then [defendant] hid out for four months before the Fugitive Apprehension Team finally found him in another county. Does that sound to you like he had an honest and reasonable belief that he had to do what he did?"—was designed to impeach defendant's credibility following his testimony that he acted in self-defense.

In the second excerpt defendant claims was erroneous, the prosecutor said:

> [Defendant] also admitted he ran away, he spent a night in the alley; that he either threw away or lost the murder weapon that night; that he talked to lawyers almost right away; that he didn't turn himself in; that he didn't reach out

[3] "Argument must be supported by citation to appropriate authority or policy." MCR 7.212(C)(7); *Payne*, 285 Mich App at 188.

> to anybody in law enforcement prior to his arrest and say, ["H]ey, you got this thing wrong. I know you're looking for me. You don't know what's going on.["] He agreed to [sic] all of that. He wants us to believe he did that on advice of counsel?

This was a proper use of defendant's silence, before he was arrested and given *Miranda* warnings, in response to his claim that he did not come forward for four months as a result of speaking to a lawyer he did not retain. "[N]onverbal conduct by a defendant, a failure to come forward, is relevant and probative for impeachment purposes when the court determines that it would have been 'natural' for the person to have come forward with the exculpatory information under the circumstances." *Clary*, 494 Mich at 285 n 12. Because the prosecutor's commentary on defendant's prearrest silence conformed to case law interpreting the constitutional right against compelled self-incrimination, defendant has not demonstrated misconduct.

Affirmed.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kurtis T. Wilder

Order

Michigan Supreme Court
Lansing, Michigan

June 3, 2015

149917

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 149917
COA: 314315
Wayne CC: 11-012794-FC

JOHN OLIVER WOOTEN,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the June 26, 2014 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.302(H)(1). The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the prosecution is permitted, during its case-in-chief, to elicit testimony from a police witness regarding the defendant's pre-arrest silence or failure to come forward to explain a claim of self-defense, see, e.g., *Combs v Coyle*, 205 F3d 269 (CA 6, 2000); *Hall v Vasbinder*, 563 F3d 222 (CA 6, 2009); (2) whether such evidence is admissible as substantive evidence of the defendant's guilt, or as impeachment of the defendant's anticipated defense theory; and (3) if such evidence is inadmissible, whether the trial court clearly erred in finding that the trial prosecutor did not intentionally goad the defense into moving for a mistrial, and whether the trial court erred in granting a mistrial, but allowing the defendant to be retried. The parties should not submit mere restatements of their application papers.

p0527

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

AARON SMITH,

Defendant-Appellee.

UNPUBLISHED
November 15, 2012

No. 307755
Wayne Circuit Court
LC No. 10-005266-FH

Before: MURPHY, C.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

The prosecution appeals as of right from the trial court's order dismissing charges against defendant Aaron Smith. After the first trial court declared a mistrial, the second trial court dismissed the charges because, in the trial court's opinion, double jeopardy principles barred retrying Smith. We reverse and remand.

I. FACTS

A. BACKGROUND FACTS

The trial court granted a mistrial after reversing its ruling on a statement that Smith gave to the police. The charges in this case arose out of an incident in April 2010. Officers Shawn Hunter, Melissa Adams, and Toran Crawford were in a marked police car when Officer Hunter heard five or six gunshots. After approaching the area from where Officer Hunter thought he heard the gunshots, the officers saw Smith in an alley. Officer Hunter testified that Smith turned and saw the police car, and then began running down the alley. Officer Toran and Officer Adams each testified that they saw Smith with a gun. Officer Toran testified that he saw Smith make a throwing motion with his hand, but that he did not see the gun come out of Smith's hand or see it land. Officers searched a nearby field and found a gun about 50 to 75 feet from where the officers detained Smith.

Officer Calvin Washington testified that, when he spoke with Smith at the police station, Smith waived his constitutional rights and stated that he wanted to make a statement. Smith

answered four questions, and then refused to answer any more. The prosecution charged Smith with felon in possession of a firearm[1] and possession of a firearm during the commission of a felony.[2]

B. THE STATEMENT

Defense counsel filed a motion in limine that sought to admit the first four questions and answers in Smith's statement. The trial court ruled that Smith could not admit evidence of his responses to Officer Washington's questions, but that the questions were admissible. In its opening statement, the prosecution told the jury that it would hear evidence that Smith made a statement to police in which admitted he was in the area, claimed that he was running because he heard gunshots, and denied that he had a gun. In Smith's opening statement, defense counsel stated that Smith voluntarily spoke with the police and denied that the gun the police found was his.

At trial, Officer Washington testified that he interviewed Smith, and that Smith made a written statement. Defense counsel challenged the admission of Smith's written statement, arguing that it implicated Smith's right to silence because it showed that he refused to answer the rest of Officer Washington's questions. The trial court adjourned at the prosecution's request.

C. THE MISTRIAL

When the trial continued, the prosecution argued that Smith's written statement was admissible in its entirety as a statement against Smith's interests, because it placed him at the location of the gunshots. The trial court ruled that Smith's questions, answers, and the written statement were not incriminating and were inadmissible hearsay.

Smith moved for a mistrial, arguing that the ruling violated his rights to due process because the prosecution had already argued the significance of and presented evidence of Smith's statements. Smith argued that the trial court's ruling would prevent him from arguing or relying on the same statement in his closing. The trial court denied Smith's motion, stating that there was no basis for a mistrial.

The trial court then moved off the record for five minutes. When it returned to the record, the trial court explained that

> [B]ecause the jurors have heard that there was an interrogation session, because the jurors have heard that the Constitutional Rights were given and that a statement was forthcoming that . . . cannot be redacted from the minds of the jurors or from the record and that since the Court has ruled that the statement is not admissible at this junction, that there must be a mistrial granted.

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[1] MCL 750.224f.

[2] MCL 750.227b.

Defense counsel challenged the trial court's ruling, arguing that it was no longer requesting a mistrial, and that the trial court had already ruled on counsel's motion. The trial court stated that it was declaring a mistrial sua sponte.

D. PROCEDURAL HISTORY AND DISMISSAL

In January 2011, the trial court held a hearing and determined that it could retry Smith because jeopardy had not attached. In April 2011, the trial court reassigned the case. Defense counsel filed a motion to dismiss in May 2011. The second trial court denied the motion in June 2011, but granted Smith a stay for an interlocutory appeal. This Court denied Smith's application for leave to appeal because the issue did not require immediate review.[3]

The trial court held a second special pretrial hearing on November 17, 2011. Defense counsel moved the trial court to reconsider Smith's motion to dismiss. Defense counsel argued that Smith did not consent to the mistrial, there was no manifest necessity to grant the mistrial, and that the trial court must dismiss the case because jeopardy had attached. The trial court granted Smith's motion to dismiss, determining that defense counsel had not consented to the mistrial and there was no manifest necessity to grant the mistrial.

II. DOUBLE JEOPARDY

A. STANDARD OF REVIEW

"A double jeopardy challenge presents a question of constitutional law that this Court reviews de novo."[4]

B. LEGAL STANDARDS

The Fifth Amendment of the United States Constitution protects a criminal defendant from being "twice put in jeopardy of life or limb . . . ."[5] The Michigan Constitution contains a parallel provision that this Court construes consistently with the Fifth Amendment.[6] This provision protects a criminal defendant against multiple prosecutions for the same offense.[7] The

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[3] *People v Aaron Smith*, unpublished order of the Court of Appeals, issued August 11, 2011 (Docket No. 304799).

[4] *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007).

[5] US Const, Am V; *People v Szalma*, 487 Mich 708, 715-716; 790 NW2d 662 (2010).

[6] Const 1963, art 1, § 15; *Szalma*, 487 Mich at 716.

[7] *People v Lett*, 466 Mich 206, 213-214, 215; 644 NW2d 743 (2002).

trial court implicates this right when it declares a mistrial after the jury is empanelled and sworn.[8]

However, the Double Jeopardy Clause does not automatically bar a second trial when the trial court declares a mistrial.[9] "It is well settled, for instance, that where a defendant requests *or* consents to a mistrial, retrial is not barred" unless the prosecution provoked the defendant to request a mistrial.[10] If defense counsel argues that a mistrial is warranted but refuses to expressly consent to a mistrial, the defendant has "consented to discontinuance of the trial by expressly objecting to its continuance."[11] By moving the trial court for a mistrial, the defendant waives his or her double jeopardy claim unless prosecutorial misconduct provoked the motion.[12] A waiver is an intentional relinquishment of a known right.[13] A defendant's waiver "extinguishe[s] any error."[14]

C. APPLYING THE STANDARDS

It is very clear from the facts of this case that defense counsel did not consent to the mistrial. However, it is equally clear that defense counsel *requested* a mistrial. We conclude that defense counsel's request waived his double jeopardy claim.

This case is very analogous to this Court's decision in *People v Tracey*. In that case, the trial court allowed a complainant to testify about a statement in front of the jury despite defense counsel's objection.[15] Neither defense counsel nor the prosecution requested a mistrial.[16] However, defense counsel stated that he did not want to go forward with the trial.[17] The trial

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[8] *Id*. at 215; *United States v Scott*, 437 US 82, 87; 57 L Ed 2d 65; 98 S Ct 2187 (1978).

[9] *Lett*, 466 Mich at 215.

[10] *Id*. (emphasis supplied).

[11] *People v Tracey*, 221 Mich App 321, 327; 561 NW2d 133 (1997); see *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999).

[12] See *Oregon v Kennedy*, 456 US 667, 672; 102 S Ct 2083; 72 L Ed 2d 416 (1982); *People v Dawson*, 431 Mich 234, 253; 427 NW2d 886 (1988); *People v Gaval*, 202 Mich App 51, 53; 507 NW2d 786 (1993).

[13] *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011).

[14] *Id*.

[15] *Tracey*, 221 Mich App at 323.

[16] *Id*.

[17] *Id*.

court declared a mistrial sua sponte, reasoning that the prosecution's failure to disclose the evidence was intentional prosecutorial misconduct and deprived the defendant of a fair trial.[18]

On appeal, this Court determined that the prosecution did not engage in misconduct.[19] However, we determined that the defendant "clearly indicated that he did not want to continue the trial" by moving for a dismissal and indicating that he did not want to go forward with the trial.[20] We then concluded that the defendant waived his double jeopardy interests by requesting a mistrial.[21] Neither defense counsel nor the prosecution moved the trial court for a mistrial, but this Court determined the defendant unequivocally consented to discontinue the trial, even though he did not formally consent to the mistrial.[22]

Here, defense counsel moved the trial court to declare a mistrial. As in *Tracey*, Smith's rights to due process were implicated when the trial court erroneously admitted evidence. As in *Tracey*, the trial court sua sponte declared a mistrial because the circumstances deprived the defendant of a fair trial. And even more clearly than in *Tracey*, Smith expressly objected to continuing the trial. Defense counsel made a formal motion for a mistrial, arguing similar due process concerns as those that led the trial court to reconsider the motion sua sponte only five minutes later. We conclude that Smith unequivocally consented to the discontinuance of the trial. Thus, we conclude that Smith waived his double jeopardy interests by requesting a mistrial, even though he later challenged the trial court's grant of a mistrial.

Because we have determined that Smith consented to the mistrial, we need not determine whether the trial court based its mistrial on manifest necessity.[23] Smith's waiver extinguished any error.[24] For these reasons, we reverse the trial court's dismissal of the charges against Smith, and remand for retrial.

Reversed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

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[18] *Id*.

[19] *Id*. at 325.

[20] *Id*. at 327.

[21] *Id*. at 329.

[22] *Id*.

[23] See *Id*. at 327-329 (this Court reversed when the defendant consented to the mistrial, even though there was no manifest necessity for the mistrial).

[24] *Dawson*, 431 Mich at 253; *Kowalski*, 489 Mich at 503.